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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

WORTHINGTON CORPORATION, *Petitioner*

v.

LEASE MANAGEMENT, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Worthington Corporation prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-captioned case on October 9, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, pp. 1a-12a) is reported at 352 F.2d 24. The judgment entered upon the jury verdict is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 9, 1965. A timely petition for rehearing was filed on October 28, 1965, and denied on November 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals' holding that the trial court improperly withheld the issue of contributory negligence from the jury, is so devoid of support in the record that it constitutes a denial of due process.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

STATEMENT

This is a diversity action for property damage arising out of an explosion which occurred in Vestaburg, Michigan, on November 24, 1959. Petitioner is a manufacturer of electrical generators; respondent, operator of a natural gas field located near the scene of the loss.

In June, 1958, petitioner contracted with Wolverine Electric Cooperative to install a new generator in its Vestaburg plant. Petitioner was to bear the risk of loss until final acceptance and payment. At the time of the loss, the generator had been installed, but the contract was not completed (R. 94a).[1] On that date,

[1] "R." as used herein refers to the Appellant's Appendix printed and filed in the Court of Appeals.

the Cooperative's plant engineer, Mr. Wood, noticed the new generator was losing power (R. 40a), switched from natural gas to fuel oil and drove to respondent's nearby plant to determine what was wrong. Respondent's supervisory employee, Mr. Lewis, determined nothing was wrong at the field so the two men drove back to the Cooperative's plant to check the line at that location.

Upon arrival, Wood and Lewis first removed and cleaned a gas regulator located on the three-inch part of the line near the generator (R. 57a). Lewis then suggested they "blow out" the three-inch line before replacing the regulator (R. 58a). Wood went to a "gas house" 60 feet away, quickly opened and shut a flow valve while Lewis remained standing next to the opening in the line (R. 51a). Wood opened the flow valve a second time, but before he could close it, dirt and gas blew through the opening, were sucked up into the nearby generator air intake and exploded, killing Lewis and substantially damaging the generator.

Petitioner filed suit in federal court against respondent's predecessor in title on January 4, 1961 (R. 1a), and amended its complaint to add Lease Management on April 24, 1961. The amended complaint charged that Lewis was negligent in conducting the operation which gave rise to the loss (R. 6a-8a). After an initial jury verdict for respondent, petitioner was granted a new trial because of an error in the instructions (R. 20a-26a).[2]

At the close of the second trial, petitioner moved *inter alia* for an order striking the defense of contri-

[2] In its opinion below, the Court of Appeals found the grant of a new trial "well within" the first trial court's discretion (App., *infra*, p. 1a).

butory negligence from the answer and removing the issue from the jury on the ground that respondent had failed to produce sufficient evidence (R. 121a-122a). The trial court agreed that "under the proofs in this case" it "would not be warranted in submitting the issue of contributory negligence for a determination by the jury" (R. 123a).

The jury returned a verdict for petitioner in the sum of $118,778.90. Respondent's motion for a new trial and reduction of verdict were denied (R. 179a), whereupon it filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit (R. 2a).

On October 9, 1965, the circuit court reversed the entry of judgment by the trial court and remanded the case for a third trial on the ground that the District Judge improperly withheld the issue of contributory negligence from the jury (App., *infra,* p. 6a). Petitioner filed a timely petition for rehearing which was denied on November 10, 1965. (App., *infra,* p. 14a)

REASONS FOR GRANTING THE WRIT

We fully recognize that this Court will not ordinarily grant certiorari to review findings of fact. Thus parties should generally avoid burdening it with such questions. But the instant case presents such an extraordinary error by a United States Court of Appeals that we are compelled to seek review on the grounds that the holding below violates due process and calls for the exercise of this Court's supervisory power.

1. This Court has made it unmistakably clear that any decision which is totally devoid of evidentiary support or based on no evidence at all violates the constitutional mandate of due process. *Thompson* v.

Louisville, 362 U.S. 199 (1960). The fact that *Thompson* involved review of a criminal conviction under the Fourteenth Amendment, does not impair its application to a civil proceeding in a federal court. The proposition that a dispositive ruling must ultimately rest on some support in the record is fundamental to the very nature of the judicial process, whether exercised in a civil or criminal proceeding. *Cf. Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957).

The dispositive holding below was that the trial court improperly withheld the issue of contributory negligence from the jury. This decision was based on the Court of Appeals' finding that:

> A careful review of this record convinces us that there was testimony from which the jury could have found or inferred 1) that plaintiff Worthington was responsible for the design and layout of the generator which located its air intake near the removable regulator, 2) that plaintiff knew, or should have known, of the possibility that the regulator might be removed in order to blow out the line while the plant was operating, and 3) that such location of the air intake of an acknowledged dangerous instrumentality was negligence which contributed as a proximate cause of this explosion. (App., *infra,* p. 6a)

The short answer to this statement is that there is absolutely no basis in the record upon which the Sixth Circuit could possibly find support for proposition "1," while "2" is the product of a clear mistake. Hence "3" loses its validity as a conclusion of law since petitioner could not be negligent under any theory without knowledge of a foreseeable danger and responsibility for location of the vent in light of that knowledge.

The only evidence in the record dealing with petitioner's responsibility for the plant layout and location of the intake near the regulator is contained in the following exchange between respondent's counsel and Mr. Wood the Cooperative's plant engineer:

> Q. Now, Mr. Wood, were you there during all the time that this particular engine or any part of it was being installed?
> A. Yes.
> Q. Do you know by whom the lay-out plan was designed or engineered?
> A. Yes.
> Q. By whom was it designed or engineered?
> A. Well, it was the Zimmerman Engineering Company, Grand Rapids.
> Q. And that is an architectural engineering firm?
> A. Architectural Engineers.
> Q. Didn't they work together in conjunction with the Worthington people?
> A. Yes.
>
> (R. 67a)

Respondent did not establish:

—whether petitioner worked with the architects before, after or during the installation of the generator.

—whether petitioner was called in by the architects, volunteered its services or was ordered to assist by the Cooperative.

—whether petitioner had any responsibility for the general location of the generator.

—whether petitioner had any responsibility for the location of the air intake near the regulator.

—whether the question of its proximity to the regulator was ever discussed.

—whether it should have been discussed.

There is nothing to indicate that respondent was precluded from calling a member of the architectural firm located nearby. Nor is there anything to indicate that respondent ever sought to cross-examine any of petitioner's employees on the issue. In short, there is simply nothing in the record beyond the single word "Yes" to describe the nature and extent of petitioner's relationship to the architects and its responsibility, if any, for the location of the generator and its vent near the regulator.

Similarly, the second finding, that dealing with foreseeability, is based on a clear mistake of fact, *i.e.*, the Sixth Circuit's assumption that

> Defendant's testimony at trial tended to establish that the regulator had previously been removed several times to blow out the gas line, and that plaintiff Worthington knew, or should have known, of this possibility. (App., *infra*, p. 5a)

There is no evidence to show that the regulator in question or any other regulator had been removed previously for the purpose of blowing out a line. There was testimony that a regulator had been removed for cleaning previously (R. 96a) and that another portion of the line had been blown out before (R. 65a). But there was no evidence to link these two separate and distinct acts. The record does not indicate whether the regulator referred to in the above testimony was the one in question or, more importantly, whether the portion of the line leading to the generator or any

other portion was "blown out" *at the same time* the regulator was removed for cleaning.

The absence of any connection between these two events and the corresponding source of the court's error is so apparent it requires no further elaboration except to note there was uncontradicted evidence that the precise portion of the line in question—the three-inch section containing the regulator and leading to the generator—had never been "blown out" before the loss (R. 55a). This testimony in no way conflicts with the other evidence and thus should not have been disregarded by the Court of Appeals. Rather it was entirely consistent.

If there were even a possibility of constructing a basis for either finding or inference, the decision below might stand. But by any test of reasonableness, the result cannot be squared with the record or the elemental demands of due process.

2. The decision below also warrants review in the interest of sound administration of justice in the federal courts. The error of the Court of Appeals is clear and substantial. It is not and should not be immune from review merely because it involves a finding of fact. This Court has long recognized an obligation to exercise its supervisory powers to examine such matters when "left with the definite and firm conviction that a mistake has been committed." *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Even concurrent findings of fact below may be reviewed in the presence of "a very obvious and exceptional showing of error." *Graver Tank and Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

Thus the question is not one of power, but propriety. We recognize and agree with the proposition that ordinarily the Court will not grant certiorari to "re-

view evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1925). This policy is appropriately based on a due regard for the demands of the Court and orderly disposition of litigation. But at the same time, we recognize that this Court has on occasion taken appropriate opportunities to remind the lower federal courts that gross errors in dealing with the record will not be tolerated. *E.g., Stringfellow* v. *Atlantic Coast Line R. Co.,* 290 U.S. 322 (1933).

The instant case is susceptible of such treatment. Moreover, a full hearing is not required to make the point since the Court does not have to weigh any evidence or make any new findings of fact. Both petitioner's right to due process and the sound administration of justice can be secured by the granting of certiorari, summary reversal and remand of the case to the Court of Appeals with appropriate instructions.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1966

APPENDIX

No. 15848

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WORTHINGTON CORPORATION, a Delaware Corporation,
Plaintiff-Appellee,

v.

LEASE MANAGEMENT, INC., a Michigan corporation,
Defendant-Appellant.

APPEAL from the District Court of the United States for the Eastern District of Michigan, Northern Division.

Decided October 9, 1965.

Before: O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

EDWARDS, Circuit Judge. This appeal is from a jury verdict and judgment for plaintiff in the amount of $118,-777.90. [sic][1] The suit, brought under federal diversity jurisdiction, arose out of an explosion of a generator being installed by plaintiff on the premises of Wolverine Electric Cooperative. The explosion wrecked the generator and

[1] Defendant Lease Management also appeals from the grant of a motion for new trial following an earlier trial of this case wherein defendant secured a jury verdict. At the conclusion of the first trial District Judge Picard (now deceased) granted plaintiff's motion for a new trial on the ground that his charge has misstated the doctrine of Respondeat [sic] superior under which plaintiff sought to hold Lease Management for the negligence of its employee Lewis. We have reviewed the charge as given by Judge Picard and his opinion on the motion and hold that his grant of the motion for new trial was well within his judicial discretion. Rule 59, Fed. R. Civ. P. We have dealt with this issue separately so that the body of this opinion may deal principally with the issues of the second trial.

killed Lester Lewis, an employee of defendant. Plaintiff claimed (and the jury verdict must be read as agreeing) that defendant Lease Management, Inc.'s, negligence was a proximate cause of the explosion. Defendant Lease Management, Inc., appeals claiming, among other things, that plaintiff was contributorily negligent and that the trial judge committed reversible error by not submitting this issue to the jury.

Wolverine Electric Cooperative is an electric power-producing cooperative which operates a plant at Vestaburg, Michigan. In 1959 it decided to expand its electric power output by installation of a sixth generator and signed a contract with plaintiff Worthington Corporation for purchase and installation of the generator. Worthington started performance of the contract (which placed risk of loss on it until acceptance and payment) and as of November 24, 1959, was still working on the generator, although it was installed and in operation.

The generator was designed to use two types of fuel—natural gas and diesel oil. Wolverine had a contract with a near-by oil and gas field, owned by Rock Oil & Gas Company, for the furnishing of natural gas at a rate more economical to it than diesel oil. The gas came from Rock Oil's Edmore field six miles away via a pipeline owned by Wolverine. Rock Oil's contract required it to furnish gas "dry and free from solids and liquids."

In 1958, after date of Rock Oil's contract with Wolverine, Rock Oil contracted with defendant Lease Management, Inc., to take over management, operation and maintenance of its Edmore field. It appears that under Rock Oil's arrangement with Lease Management, Inc., defendant Lease Management stepped into Rock Oil's shoes in all respects as far as this litigation is concerned, since Rock Oil was dismissed on motion as a party defendant and no appeal is brought pertaining to that dismissal.

On November 24, 1959, the chief operator of the Vestaburg plant for Wolverine, Mr. Myron Wood, noticed that the new generator being installed by plaintiff Worthington was losing power. He switched the generator over from gas to oil fuel and drove to the Edmore field to find out what was wrong. Previously Rock Oil had told Wolverine's personnel to contact a Mr. Lewis at the field about any problems, and Wood did so. Lester Lewis, originally a Rock Oil employee, had been placed on defendant Lease Management's payroll when the latter took over the Edmore operation. Lewis checked and determined there was no trouble at the field, whereupon Wood drove back to the Wolverine plant, followed by Lewis.

At trial of this case, Wood testified that he and Lewis decided to take the "regulator" off the gas pipeline at a point located on the outside wall of the plant. The regulator was located in close proximity to the air intake for the Worthington generator which was still in operation. He testified that Lewis had brought a tool box with him to the plant and that he and Lewis removed the regulator, disassembled and cleaned it out, and reassembled it.

Wood also testified:

"Q. (By Mr. Zelle) What was done after the regulator had been taken apart?
"A. It was reassembled.
"Q. Who reassembled it?
"A. Mr. Lewis and I.
"Q. What was done next?
"A. We went out to blow out the line.
"Q. You went to blow out the line?
"A. That is right."

In any event, Wood then went to a "gas house" 60 feet away where the pipeline meter and valves were located while Lewis stood near the place where the regulator had

been removed, leaving a 12-inch open gap in the pipeline. Wood's testimony continued:

> "Q. (By Mr. Zelle) . . . What next happened?
> "A. I opened the valve and closed it.
> "Q. What valve is that?
> "A. This was the valve that was in the three-inch line. I opened it and closed it. I opened it and at that time the dirt blew out and a second later the thing blew up.
> "Q. What dirt blew out?
> "A. How?
> "What dirt are you talking about? You mean the dirt in the line?
> "A. The dirt came out of the line. There was a cloud of dirt came out of this line. The first time I opened it we got an awful charge of dirt out of it, and the second time I opened it, we still got some dirt out of it, but not as much and just an instant after that things happened."

The "things" which happened were the explosion of the generator which killed Lewis and occasioned the damage to the generator for which this suit was filed.

At trial of this case an engineer employed by plaintiff Worthington (called as a witness by plaintiff) testified in effect that the explosion had occurred because the removal of the regulator had left an opening in the gas pipeline close to the air intake for the Worthington generator. The air intake (located on the outside of the building within three feet of the regulator on the pipeline) drew air at the rate of 10,000 cu.ft. per minute into the engine cylinder. When Wood turned the valve on for the second time, gas coming out of the opening at a rate of 7,400 cu. ft. per minute was mixed with air, sucked into the air intake and into the engine cylinder and ignited by the exhaust flame, resulting in the explosion.

Both parties conceded at trial (and before us) that the generator—built to consume gas in great quantities—fell into the "dangerous instrumentality" category.

Defendant's testimony at trial tended to establish that the regulator had previously been removed several times to blow out the gas line, and that plaintiff Worthington knew, or should have known, of this possibility. Defendant's testimony also tended to establish that the design and layout of the Worthington generator was done by an architectural firm working with plaintiff Worthington.

Under Michigan law, which, of course, we apply here, defendant was required to plead and prove contributory negligence as an affirmative defense. Michigan Court Rules No. 111.7. But likewise under Michigan law, contributory negligence if affirmatively proven, bars plaintiff's recovery, and, ordinarily, is held to be an issue for jury consideration. *McKinney* v. *Yelavich,* 352 Mich. 687 (1958); *Serratoni* v. *C. & O. Ry. Co.,* 333 F.2d 621 (C.A. 6, 1964); *Hileman* v. *Northwest Engineering Co.,* 346 F.2d 668 (C.A. 6, 1965).

Indeed, exceptions to jury consideration are rare. In the much cited *Van Steinburg* case, Justice Cooley stated the basic Michigan rule as to them. "The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility." *Detroit & Milwaukee Railroad Co.* v. *Van Steinburg,* 17 Mich. 99, 120 (1868). While this was said about a verdict directed against a plaintiff, it also applies to an instruction against a defendant on the issue of contributory negligence. See *Hileman* v. *Northwest Engineering Co., supra.* And, of course, on an instructed verdict on this issue, we review the evidence applicable to it from the point of view favorable to the party (here the defendant) who was deprived of a jury decision. *Price* v. *Firestone Tire and Rubber Company,* 321 F.2d 725 (C.A. 6, 1963); see also, *Ware* v. *Nelson,* 351 Mich. 390 (1958).

A careful review of this record convinces us that there was testimony from which the jury could have found or inferred 1) that plaintiff Worthington was responsible for the design and layout of the generator which located its air intake near the removable regulator, 2) that plaintiff knew, or should have known, of the possibility that the regulator might be removed in order to blow out the line while the plant was operating, and 3) that such location of the air intake of an acknowledged dangerous instrumentality was negligence which contributed as a proximate cause of this explosion.

In this vigorously disputed and closely balanced negligence contest, the failure to instruct that a finding that plaintiff was guilty of negligence which contributed as a proximate cause to the happening of the accident would require a verdict for defendant was in our judgment error which could easily have affected the result.

While what we have said clearly requires reversal for new trial, some of the other issues in this appeal may again be presented and some comment on them may be helpful.

In the background of this case—and adding to its complexity at both trials—has been a very interesting document. During the course of both trials defendant sought to introduce a contract which it claimed had been executed between plaintiff Worthington, its insurance carrier, and Wolverine Electric Cooperative and its insurance carrier. By the terms of this instrument Wolverine's insurance carrier and Worthington's insurance carrier in effect split an agreed estimate of actual damages to the generator of $102,570.66. This figure was reduced by $5,000 deductible charged to Worthington and it omitted any profit Worthington might have contemplated on the generator. Each insurer paid Worthington $48,785.30.

The contract further provided for a release to Wolverine and for a covenant not to sue Wolverine executed by

Worthington. It further provided that any recovery effected by Worthington would be divided between Worthington's insurance carrier and Wolverine's insurance carrier:

> "Any settlement achieved or recovery made shall first be subject to the payment of attorneys' fees and costs (subject to Paragraph VII), and shall thereafter be divided pro rata between WORTHINGTON, PROTECTION and ATLAS, with WORTHINGTON to receive 18.38% of the net recovery as hereinafter defined, and PROTECTION and ATLAS each to receive 40.81% of the net recovery as hereinafter defined."

By this arrangement Wolverine, at least a possible joint tortfeasor, sought (successfully at the second trial) to step securely into the shoes of plaintiff Worthington without the jury knowing it.

But Wolverine's agent, Wood, was both the principal surviving active agent in the events which produced this explosion and the sole surviving eye witness at the trial. This is quite a blindfold for a jury to wear where it is asked to determine a negligence case at least in large part by judging the credibility of this witness.

Doubtless with these considerations in mind, defendant moved at the second trial to add Wolverine as a party defendant under Michigan Court Rule 204 (G.C.R. 1963, 204) which for the first time allowed one joint tortfeasor to implead another in a suit by an injured party against the movant. The District Judge denied this motion, doubtless in reliance upon the well-reasoned opinion in *Buckner* v. *Foster,* 105 F. Supp. 279 (E.D. Mich. 1952), *aff'd. on other grounds,* 203 F.2d 537 (C.A. 6, 1953).

Whatever the merits of that ruling when made the underpinning of *Buckner,* has now been removed by decision of

the Michigan Supreme Court in *Husted* v. *Consumers Power Company,* 376 Mich. 41 (1965), which clearly construes Court Rule 204 as procedural rather than substantive in its effect.

> "Some preliminary observations are in order. The first is made by reference to specific comment Honigman & Hawkins have appended to the third-party rule. They say of the rule, and we agree (I Honigman and Hawkins, Michigan Court Rules Amended, p. 508):
>
> " 'Rule 204 does not create substantive rights. The substantive basis for defendant's claim against the third-party defendant must be found elsewhere before the rule becomes operative. That basis may be found in principles of indemnity, subrogation, contribution, warranty, or other substantive right.'
>
> "The next is that the substantive rights and liabilities of all present parties are determinable properly according to the law as it stood when the causes alleged by the two plaintiffs accrued in 1959. At that time, and quite aside from the remedies equity then provided (and yet provides despite the 'merger' of law and equity) for reimbursement, subrogation, exoneration and indemnity (see authorities considered in *Hack* v. *Concrete Wall Co.,* 350 Mich. 118 at 123-126; *Hack Investment Co.* v. *Concrete Wall Co.,* 356 Mich. 416, 421-423, and *Ellis* v. *Phillips,* 363 Mich. 587), the only remedy available to a joint tortfeasor against his brother in guilt was by chancery action for contribution taken in pursuance of the act of 1941 (CL 1948, § 691.561 *et seq.* [Stat. Ann. 1959 Cum. Supp. § 27.1683 (1)]). The act of 1941 was changed in minor degree (to accommodate the new procedure only and not to change the substance) and re-enacted as section 2925 of the revised judicature act of 1961 (CLS 1961, § 600.2925 [Stat. Ann. 1962 Rev. § 27A.2925])." *Husted* v.

Consumers Power Co., supra at 47. (Footnote omitted.)

Thus, contrary to the reasoning of *Buckner* v. *Foster, supra,* the Michigan Supreme Court has plainly held its new rule to be procedural and pointed to the statutory right of contribution as the substantive right. Under this interpretation it seems clear that defendant Lease Management's motion to implead Wolverine should have been granted, and, if renewed on retrial, now must be. Rule 14, Fed. R. Civ. P.

Appellant also claims reversible error in the District Judge's failure to bar witness Wood's testimony concerning certain alleged statements of the deceased, Lewis, when objection was made based on Michigan Stat. Ann. § 27A.-2160(3). This statute bars testimony from an "opposite party" about "matters which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation. . . ."

Since we have determined to reverse for new trial on other grounds, we see no need to decide this matter on the somewhat inadequate factual record now presented. The new trial is certain to produce a quite different record as to some of the facts necessary to bring this statute into operation. It is appropriate, however, to observe that this circuit has held a state Dead Man's Statute to bar such conversations in a diversity case tried in federal court on appropriate facts pertaining to the witness and to the deceased. *Appolonio* v. *Baxter,* 217 F.2d 267 (C.A. 6, 1954), See also *Wright* v. *Wilson,* 154 F.2d 616 (C.A. 3, 1946), *cert. denied,* 329 U.S. 743 (1946), 170 A.L.R. 1237.[2]

[2] This case discusses at length the question (not briefed before us or discussed in *Appolonio*) as to whether Rule 43(a) of the Federal Rules of Civil Procedure, because it favors the admissibility of evidence, should be read in diversity cases as rendering state Dead Man's Statutes inapplicable. Judge Goodrich's opin-

Appellant also contends that it should have been entitled to an instruction to the jury to the effect that its deceased employee, Lewis, was presumed to be free from negligence.

Presumptions are generally regarded as substantive in nature, and hence, in a diversity case, are governed by state law. 2B Barron and Holtzoff, Federal Practice and Procedure, § 964 (Wright ed. 1961); *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437 (1959).[3]

The fundamental statement of the applicable presumption under Michigan law is set forth in *Gillett* v. *Michigan United Tractor Co.*, 205 Mich. 410:

> "When direct, positive and credible rebutting evidence is introduced, the presumption ceases to operate; but when circumstantial evidence of doubtful value is the only rebutting evidence offered, the question should be submitted to the jury, and if they decide that the circumstantial evidence should be disregarded, the presumption is still sufficient to establish plaintiff's

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ion (which reached a negative answer "without enthusiasm") apparently represents the current weight of authority in the federal circuits. *Wright* v. *Wilson, supra,* 3rd Circuit; *Appolonio* v. *Baxter, supra,* 6th Circuit; *Duling* v. *Markun,* 231 F.2d 833 (C.A. 7, 1956), *cert. denied,* 352 U.S. 870 (1956); *Potlatch Oil & Refining Co.* v. *Ohio Oil Co.,* 199 F.2d 766 (C.A. 9, 1952), *cert. denied,* 345 U.S. 926 (1953). But see *Hope* v. *Hearst Consolidated Publications, Inc.,* 294 F.2d 681 (C.A. 3, 1961), *cert. denied,* 368 U.S. 956 (1962); *Monarch Insurance Co. of Ohio* v. *Spach,* 281 F.2d 401 (C.A. 5, 1960); *Croom* v. *Fiedler,* 341 F.2d 909 (C.A. 6, 1965).

[3] In this case arising from state law which also involved a presumption, Mr. Chief Justice Warren noted but did not decide the question of "[W]hether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. . . ." *Dick* v. *New York Life Ins. Co.,* 359 U.S. 437, 444-45. In this case (as in the instant case) both parties assumed that the state standard applied.

case as to the exercise of proper care by the deceased. . . .'' *Gillett* v. *Michigan United Tractor Co., supra* at 415-16.

On the factual record which we have set forth, there was certainly evidence from which the jury could have found Lewis guilty of negligence. But such a finding would, of course, hinge on whether he knew or should have known of the existence of the air intake for the Worthington generator and what its suction of a quantity of gas would do. While the matter is by no means undisputed (See *Steger* v. *Blanchard,* 353 Mich. 140 (1958); *Weller* v. *Mancha,* 353 Mich. 189 (1958); *Cf: Tien* v. *Barkel,* 351 Mich. 276 (1958); *Britten* v. *Updyke,* 357 Mich. 466 (1959)), we conclude that the evidence herein relied upon to rebut the presumption includes circumstantial and debatable evidence, and that the instruction on the presumption of due care should have been given. We cannot, of course, predict what the factual record of a new trial may bring.

We find no other reversible error.

Reversed for new trial.

PHILLIPS, Circuit Judge. (Concurring) I concur in the well-reasoned opinion which has been prepared by Judge Edwards reversing and remanding this case for a new trial. On the question of the possible application of the Michigan Dead Man's Statute, I concur in the view that, under the rule now in effect in this Circuit, Rule 43(a) of the Federal Rules of Civil Procedure does not foreclose the application of the Michigan statute in a diversity case tried in Michigan under facts calling for such application. We have chosen to follow *Appolonio* v. *Baxter,* 217 F.2d 267 (C.A. 6) in the present case under the doctrine of stare decisis. This appears to be the present majority rule, although there is persuasive authority to the contrary. (See cases cited in second footnote to the opinion of Judge Edwards.)

Quite obviously the holding in the present case will not preclude this court under appropriate facts at a future date from reconsidering this rule in the light of subsequent developments in the law on this subject.

Whether or not the facts of this case will call for application of the Dead Man's Statute is a matter to be determined by the district court from the evidence developed at the new trial.

O'SULLIVAN, Circuit Judge. (Concurring) I concur in the opinions of Judges Edwards and Phillips. I wish to make clear however my understanding that our decision holds that the involved Michigan Statute M.S.A. § 27A.2160(3) is applicable to diversity actions tried in Michigan.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15,848

WORTHINGTON CORPORATION, *Plaintiff-Appellee,*

v.

LEASE MANAGEMENT, INC., *Defendant-Appellant.*

BEFORE: O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

Judgment

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and remanded for a new trial.

It is further ordered that defendant-appellant recover from plaintiff-appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
s/ CARL W. REUSS
Clerk

Issued as Mandate:

COSTS: To be recovered by Appellant

A True Copy-
Attest:

Filing fee	$ 25.00
Printing	$ 524.42
Bond Premiums	$1,541.88
Total	$2,091.30

.....
CARL W. REUSS, Clerk

Filed: Oct. 9, 1965

No. 15,848

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WORTHINGTON CORPORATION, a Delaware Corporation,
Plaintiff-Appellee,

v.

LEASE MANAGEMENT, INC., a Michigan Corporation,
Defendant-Appellant.

Order

Before: O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

A petition for rehearing having been received and considered by the court in the above-styled appeal,

IT IS HEREBY ORDERED that said petition be DENIED.

Entered by order of the Court
s/ CARL W. REUSS
Clerk

Filed: Nov. 10, 1965

Office-Supreme Court, U.S.
FILED
FEB 23 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

WORTHINGTON CORPORATION, a Delaware corporation,
Petitioner,
vs.
LEASE MANAGEMENT, INC., a Michigan corporation,
Respondent.

No. 997

OBJECTION TO PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI and MOTION TO AFFIRM THE JUDGMENT WITH BRIEF IN SUPPORT THEREOF

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and
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

WORTHINGTON CORPORATION, a Delaware corporation,
Petitioner,

vs.

LEASE MANAGEMENT, INC., a Michigan corporation,
Respondent.

OBJECTION TO PETITION FOR WRIT OF CERTIORARI

Lease Management, Inc., by its attorneys, objects to the plaintiff's petition for Writ of Certiorari and moves to affirm the judgment of the United States Court of Appeals for the Sixth Circuit upon the following grounds:

1. It is manifest that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument.

2. That said petition does not meet the requirements of Rule 19 of Rules of the Supreme Court of the United States.

3. There is no basis for exercising "supervisory powers" or for reminding the United States Court of Appeals for the Sixth Circuit that "gross errors in dealing with the record will not be tolerated."

4. The opinion and judgment of the United States Court of Appeals for the Sixth Circuit is an entirely correct and proper one.

BYRON P. GALLAGHER,
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Mt. Pleasant, Michigan,
and

CHOLETTE, PERKINS & BUCHANAN,

By EDWARD D. WELLS,
Tenth Floor, Peoples Building,
Grand Rapids, Michigan 49502

Attorneys for Respondent.

BRIEF IN SUPPORT OF OBJECTION AND MOTION

STATEMENT

Plaintiff Worthington is engaged in the business of manufacturing and installing electric generators (40a). In June 1958 plaintiff entered into a contract with Wolverine Electric for the sale and installation by plaintiff of a generator (93a). At the time of the explosion the contract had not been completed (93a).

At the time of the explosion, the engine had been operating at the Wolverine Electric plant for about four months and work was still being done on the engine (41a). The architect, in conjunction with the plaintiff Worthington, designed the layout to this new engine (67a, 68a). The layout was so designed that the air intake to this new engine was outdoors, near the ground and was located about one and one-half to three feet (51a) from the regulator on the natural gas line which ran to this engine (67a, 68a, 51a). There was a low wall about three and one-half feet or so running alongside the intake (69a). The plaintiff's brief on appeal below, at page 5 sets forth a most helpful and enlightening sketch of the situation.

The gas line to this new engine was of three-inch size; the line came up from under the ground and then there was the regulator above ground (72a). This regulator regulated the gas which went to this new engine (44a). The function of the regulator was to cut the pressure from 50 to 60 pounds down to 20 to 25 pounds (44a). The regulator could be removed from the gas line by taking off the bolts on the flanges on each end of the regulator (45a). When the regulator was removed, it left an open space in the natural gas line of about twelve inches (48a).

Plaintiff's witness, Mr. Kaufman, testified that he is employed by plaintiff and is consulting engineer for the plaintiff Worthington and that he had a hand in designing the engine (76a). It was a typical generating plant (79a). The engine was intended to work either on oil or natural gas (77a). Mr. Kaufman explained in detail the operation of the engine. He explained that air comes into

the engine from the outside (78a). The air was drawn or sucked in through the outside air intake by a turbo-supercharger in the engine. Mr. Kaufman further testified that the volume of the gas which would be coming out of the twelve inch space in the three-inch line would be approximately 7,400 cubic feet per minute (82a). And 10,000 cubic feet per minute of outside air would be drawn in through the air intake (82a). He further testified, with the air intake vent system of the engine located about three feet from the ten to twelve inch opening in the gas line, that the gas flowing from the line would be drawn into the air filter of the engine (79a, 81a). That the valves in the engine are all open for about one-third of one revolution, and that the air would come through the cylinders and pass into the exhaust pipe of the engine where there would be a flame; this would ignite the gas, and there would be an explosion (81a).

On the date of the accident, Mr. Wood, the chief operator and boss of the Vestaburg plant, owned by Wolverine Electric (38a-39a) testified that the No. 6 engine which had been operating on natural gas began to lose its load (41a); he changed the engine over to diesel oil (41a) and went down to talk to Mr. Lewis, the employee of the defendant (42a). Mr. Lewis came back from the Edmore field with Mr. Wood to the Wolverine plant (43a). Mr. Wood further testified "We decided we would have to take the regulator out" (43a). This regulator was then removed from the line (45a). He testified that he and Mr. Lewis did that (45a), one on each side of the regulator (45a). The regulator was then taken into the shop, cleaned (46a) and reassembled by Mr. Wood and Mr. Lewis (46a).

There was no gas coming out of the opening where the regulator had been taken out because the gas line was turned off at the valve at the gas house located about fifty or sixty feet away (47a). Mr. Wood testified that they then decided to blow out the line (47a). Mr. Lewis "kind of suggested that we blow out that line" (58a). "I thought it would be all right" (58a).

Mr. Wood further testified that he went to the gas house (50a) and while Mr. Lewis stood about six feet from the air intake (51a) Mr. Wood opened the valve and closed

it; a cloud of dirt came out of the line (52a). He opened and closed it again and still some dirt came out, but not as much, and just an instant after than an explosion occurred (52a). The noise could be heard for miles (53a). It blew the gas house down, and Mr. Wood crawled out from the wreckage. Mr. Lewis was killed by the explosion (58a).

The natural gas came directly from the field where both oil and gas were produced (105a). The gas was a by-product of the oil (105a). Whatever kind of gas that was in the well was the kind of gas they got (111a, 112a). It was untreated (112a).

Mr. Wood testified that during the four months this new engine was operating, they had trouble off and on with the gas line (65a). He had run a one-inch line from the three-inch pipe, and ran the one-inch line under and by the air intake; there was a valve on this one-inch line (72a). He would take care of the three-inch gas line by blowing out the one-inch line. It was the same line (65a, 72a, 55a). He would do it by opening and closing the valve; on these previous occasions he had done it on his own as boss of the Wolverine Electric plant (65a).

Mr. Keane, the general manager of Wolverine Electric (92a) testified he knew Mr. Lewis and that on at least three or four occasions he saw Mr. Lewis servicing, that is taking the dirt out of the regulator of the gas line (96a).

Mr. Wood testified that he might have said while the design of the plant was going on, namely the placing of the regulator within a foot and a half of the air intake, that he "told the engineers that was a very foolish way to design it" (67a-68a).

The United States Court of Appeals for the Sixth Circuit reversed this case not only on the basis that contributory negligence was a question of fact for the jury but also reversed for other additional reasons as well, namely for the reason that Wolverine Electric should be made a third-party defendant, for possible error in permitting testimony equally within the knowledge of the deceased, and for failure to instruct that Mr. Lewis, defendant's employee and being deceased, was presumed to be free from negligence (Appendix on this Petition for Writ of Certiorari, pp. 1a-12a). Plaintiff filed a motion for rehearing with

the United States Court of Appeals on one ground only, namely that the Court erred in holding contributory negligence a question of fact for the jury. The plaintiff's motion for rehearing was denied.

ARGUMENT

The pertinent portion of Rule 19 of the Rules of the United States Supreme Court provides:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion indicate the character of reasons which will be considered:
>
> * * *
>
> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court, or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

At pages 8 and 9 of the plaintiff's Petition for Writ of Certiorari, it is stated:

> "We recognize and agree with the proposition that ordinarily the Court will not grant certiorari to 'review evidence, and discuss specific facts.' United States v. Johnston, 268 U.S. 220, 227 (1925). This policy is appropriately based on a due regard for the demands

> of the Court and orderly disposition of litigation. But at the same time, we recognize that this Court has on occasion taken appropriate opportunities to remind the lower federal courts that gross errors in dealing with the record will not be tolerated. E. g., Stringfellow v. Atlantic Coast Line R. Co., 290 U.S. 322 (1933)."

We respectfully submit there is no gross error; in fact there is no error at all. The opinion of the Court of Appeals which involves an accident occurring in Michigan was written by a former Supreme Court Justice of Michigan. As stated in the concurring opinion of Judge Phillips, it is a "well reasoned opinion."

The plaintiff seeks to deprive the defendant of a jury trial on the question of contributory negligence. The opinion of the Court of Appeals in the instant case properly states: (5a)

> "Indeed, exceptions to jury consideration are rare. In the much cited Van Steinburg case, Justice Cooley stated the basic Michigan rule as to them. 'The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility.' Detroit & Milwaukee Railroad Co. v. Van Steinburg, 17 Mich. 99, 120 (1868). While this was said about a verdict directed against a plaintiff, it also applies to an instruction against a defendant on the issue of contributory negligence. See Hileman v. Northwest Engineering Co., supra. And, of course, on an instructed verdict on this issue, we review the evidence applicable to it from the point of view favorable to the party (here the defendant) who was deprived of a jury decision. Price v. Firestone Tire and Rubber Company, 321 F. 2d 725 (C.A. 6, 1963); see, also, Ware v. Nelson, 351 Mich. 390 (1958)."

In *Grodi v. Mierow*, 244 Mich. 511, the Supreme Court of Michigan said:

> "The only question is whether plaintiff was guilty of negligence as a matter of law. The testimony and

inferences most favorable to plaintiff must be accepted."

See also *Davis v. Terrien,* 364 Mich. 82; *Humenik v. Sternberg,* 371 Mich. 667; *Morgan v. Engles,* 372 Mich. 514.

In *Ackerberg v. Muskegon Osteopathic Hospital,* 366 Mich. 596, the plaintiff entered the hospital at the emergency platform, became a little nauseated and dizzy while in the emergency room with his daughter and wife, felt the need of fresh air, went out on the emergency platform and fell off because of his dizzy condition.

Plaintiff contended defendant hospital was negligent in failing to construct a guard railing or chain around the platform, which was used for patients being transported to and from the hospital. The platform was 2 to 3 feet above the ground level. The trial court held defendant was free from negligence as a matter of law. In reversing the Court said:

"The most satisfactory statement of the rule for such a case, and the one easiest to comprehend and apply, is that given by the supreme court in Grand Trunk R. Co. v. Ives, 144 U.S. 408, 12 S. Ct. 679, 26 L. ed. (485) arising out of a controversy in this jurisdiction, where it is stated (p. 417):

" 'When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court.'

"In Detroit & Milwaukee R. Co. v. Van Steinburg, 17 Mich. 99, Justice Cooley said (p. 120):

" 'The case, however, must be a very clear one which could justify the court in taking upon itself this responsibility. For, when the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him

out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that, if the same question of prudence were submitted to a jury collected from the different occupations of society, and perhaps better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care. The next judge trying a similar case may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first has ruled to be one of law. Indeed, I think the cases are not so numerous as has been sometimes supposed in which a judge could feel at liberty to take the question of the plaintiff's negligence away from the jury.' "

"Justice Talbot Smith, writing in McKinney v. Yelavich, 352 Mich. 687, 692 said:

" 'Only under the most extreme circumstances, those in fact, where reasonable minds could not differ upon the facts, or the inferences to be drawn therefrom, can the case be taken from the jury. If honest differences of opinion between men of average intelligence might exist, the issue should not be resolved by the court alone.' "

In the leading case of *Detroit & Milwaukee R.R. Co., v. Van Steinburg,* 17 Mich. 99, the Michigan Supreme Court said:

"As a general rule, it can not be doubted that the question of negligence is a question of fact and not of law.

* * * *

" 'The question as to the existence of negligence, or a want of ordinary care, is one of a complex character. The inquiry not only as to its existence, but whether it contributed with negligence on the part of another to produce a particular effect, is much more complicated.

As to both, they present, from their very nature, a question, not of law, but of fact, depending on the peculiar circumstances of each case, which circumstances are only evidential of the principal fact — that of negligence or its effects — and are to be compared and weighed by the jury, the tribunal whose province it is to find facts, not by any artificial rules, but by the ordinary principles of reasoning; and such principal fact must be found by them, before the court can take cognizance of it, and pronounce upon its legal effect.'

"It is a mistake, therefore, to say, as is sometimes said, that when the facts are undisputed the question of negligence is necessarily one of law. This is generally true only of that class of cases where a party has failed in the performance of a clear legal duty. When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence can not be determined until one or the other of those conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they can not be decided upon by the court. Negligence can not be conclusively established by a state of facts upon which fair-minded men may well differ. In Ireland v. Oswego R.R. Co., 13 N.Y., 533, Judge Johnson, speaking upon this subject, says: 'The fact of negligence is very seldom established by such direct and positive evidence that it can be taken from the consideration of the jury and pronounced upon as matter of law. On the contrary, it is almost always to be deduced as an inference of fact, from several facts and circumstances disclosed by the testimony, after their connection and relation to the matter in issue have been traced, and their force and weight considered. In such case the inference can not be made without the intervention of a jury, although all the witnesses agree in their statements, or there be but one statement which is consistent throughout. Presumptions of fact, from their very nature, are not strictly objects of legal science, like presumptions of

law. That the care exercised by the plaintiff at the time of the injury, and the negligence of the defendant, were both questions for the jury to determine, can not admit of any doubt' " (122, 123).

In *Grand Trunk R.R. Co. v. Ives,* 144 U.S. 408, 12 S. Ct. 679, 36 L. Ed. 485, the Supreme Court of the United States said:

"As the question of negligence on the part of the defendant was one of fact for the jury to determine, under all the circumstances of the case, and under proper instructions from the court, so also the question of whether there was negligence in the deceased which was the proximate cause of the injury, was likewise a question of fact for the jury to determine, under like rules. The determination of what was such contributory negligence on the part of the deceased as would defeat this action, or perhaps, more accurately speaking, the question of whether the deceased, at the time of the fatal accident, was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person, under similar circumstances, was no more a question of law for the court than was the question of negligence on the part of the defendant. There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other. This rule is sustained by the Michigan authorities (Mynning v. Detroit, L. & N. R. Co., 64 Mich. 93; Underhill v. Chicago & G. T. R. Co., 81 Mich. 43; Baker v. Flint & P. M. R. Co., 68 Mich. 90; Engel v. Smith, 82 Mich. 1); and its correctness is apparent from an examination and analysis of the generally accepted definitions of contributory negligence, as laid down by the courts and by text-writers" (493).

See also *Barron v. City of Detroit,* 348 Mich. 213; *Wood v. Chalmers Motor Co.,* 207 Mich. 556; *Kaminski v. Grand Trunk Western R. Co.,* 347 Mich. 417, 420.

In *Sparks v. Luplow,* 372 Mich. 198 in applying the case to a question whether the plaintiff was guilty of contributory negligence as a matter of law, the Court said:

> "The test used is whether from the facts in the light most favorable to plaintiff, reasonable men could honestly reach a different conclusion. If the answer to this is "yes," the question is for the jury. Anderson v. Jean Deming Motor Sales Inc., 371 Mich. 223."

Comstock v. General Motors Corp., 358 Mich. 163, supports the proposition that the question of proximate cause is for a jury.

In the instant case, we have involved a natural gas line running to an electric generator; a dangerous agency requires the use of a higher degree of care. *Young v. Lee,* 310 Mich. 42, 47.

The opinion of the Court of Appeals states (Appendix to plaintiff's petition p. 5a):

> "Both parties conceded at trial (and before us) that the generator — built to consume gas in great quantities — fell into the 'dangerous instrumentality' category."

At page 5 of its Petition for Writ of Certiorari, plaintiff says:

> "The dispositive holding below was that the trial court improperly withheld the issue of contributory negligence from the jury. This decision was based on the Court of Appeals' finding that:
>
> " 'A careful review of this record convinces us that there was testimony from which the jury could have found or inferred 1) that plaintiff Worthington was responsible for the design and layout of the generator which located its air intake near the removable regulator, 2) that plaintiff knew, or should have known, of the possibility that the regulator might be removed in order to blow out the line while the plant was operating, and 3) that such location of the air intake of

an acknowledged dangerous instrumentality was negligence which contributed as a proximate cause of this explosion. (App., infra, p. 6a)

"The short answer to this statement is that there is absolutely no basis in the record upon which the Sixth Circuit could possibly find support for proposition '1,' while '2' is the product of a clear mistake. Hence '3' loses its validity as a conclusion of law since petitioner could not be negligent under any theory without knowledge of a foreseeable danger and responsibility for location of the vent in light of that knowledge."

In the instant case, plaintiff Worthington manufactured the engine and helped design the layout so that the air intake was located within one and one-half feet of a removable regulator in the gas line. In addition, at the time of the accident, plaintiff Worthington was still working on the engine, had been so working and installing the machine for four months prior to the explosion. We thus not only have a question of negligent design, we have a situation where the plaintiff itself installed the layout, and where, during a period of four months, plaintiff Worthington actually saw or could have seen how the situation was laid out.

The record we submit discloses the following facts or inferences:

1. This generator, using natural gas, being a dangerous substance, a high degree of care was owing.
2. Plaintiff knew this air intake to the generator gulped or sucked in large quantities of air, namely 10,000 cubic feet a minute.
3. The air intake was placed near to the ground rather than being raised some distance up into the open air above.
4. The gas line with removable regulator was located and placed approximately one and one-half feet from the air intake.

5. Plaintiff knew that if gas were sucked into the air intake, that it would be ignited by the engine and would explode.

6. The gas regulator in the gas line was placed above the ground, easily accessible and so attached to the gas line that it was easily removable.

7. The jury could infer that removing a regulator and blowing out a gas line is not an uncommon practice.

Mr. Keane, general manager of Wolverine Electric, testified:

"Q. (By Mr. Zelle): Mr. Keane, did you know Mr. Lester Lewis?

A. I did.

Q. Had you ever seen him at the plant site of the Wolverine Electric plant at Vestaburg, Michigan, prior to the date of this explosion?

A. I had.

Q. On how many occasions?

A. It would be very difficult to say at this time. At lease three or four occasions.

Q. What was he doing on the occasions you saw him?

A. Servicing —"

* * *

"Q. (By Mr. Zelle): What did you see him do physically?

A. Taking the dirt out of the regulator.

Q. Out of the gas line?

A. That is right.

Q. Had you seen him there on week days as opposed to weekends?

A. Yes, because I am very seldom in the plant on weekends.

Q. On these occasions when you would see Mr. Lewis there, was it during working hours?

A. Oh, yes" (96a).

Mr. Wood testified that during the four months during which the engine had been running, they had trouble with the gas line. They were able to take care of it by blowing it out. He testified:

"Q. Had you had any trouble with the gas line in those four months?

A. Yes, we had trouble off and on.

Q. Were you able to take care of it?

A. Well, by blowing out a line.

Q. You blew out the line on these other occasions, did you not?

A. It was nothing, only just a small line.

Q. Yes. Now, there isn't any real difference in blowing out a one-inch line or in blowing out a three-inch line in what you do, is there?

A. Well, it was a little different location.

Q. Yes, but all you do is open a valve and blow the gas through it to clear the dirt out?

A. Yes.

Q. That is what you had done previously on other lines that were clogged, right?

A. It was the same line" (65a).

Mr. Wood further testified:

"Q. (By Mr. Zelle): Will you tell how you blow that one-inch line out?

THE COURT: You may answer the question.

A. The three-inch line comes up out of the ground and it is buried underground about three feet; and this one-inch line takes off under the ground about three feet right beside the pipe that comes up through where the regulator was put on.

Well, there was a three-inch line, or the one-inch line, and the valve is up there.

Q. (By Mr. Zelle): An inch line and a valve where?

A. On the inch line. We ran a line under, through the air intake and blew it out beyond the air intake.

Q. Okay, that is what I wanted to clarify. When that one-inch line was blown out by you, where did the gas go in relation to the air intake?

A. It went beyond the air intake.

Q. Was that true when Mr. Lewis and you blew out the three-inch line?

A. No" (72a).

And on the date of the accident, Mr. Wood and Mr. Lewis in fact took the regulator off and then blew out the line. This was a gas line running directly from an oil and gas field with the gas therefrom being untreated and containing some dirt and other debris.

The evidence we submit raises a strong inference that it is not uncommon to blow gas lines out by removing the gas regulator. Whether plaintiff actually knew that the three-inch line itself had been blown out is not the important factor. Plaintiff Worthington designed and installed this layout of a dangerous agency. They should know of the possibilities that gas lines may be blown out. It is for the jury to say whether they used due care in the installation and design of this gas line and air intake.

8. The dangerous character of this air intake was concealed and misleading; there was no warning sign of danger.

9. Mr. Wood, who was long familiar with power plants, opined that the design or the layout was "very foolish."

After review of this testimony, when taken most favorably to defendant, together with all inferences to be drawn in favor of defendant, certainly there is no reason whatsoever for this Honorable Court as requested by plaintiff to take the lower Federal Court to task or to supervise it for gross or exceptional error. In fact, the ruling of the Court of Appeals we submit is entirely correct and proper.

CONCLUSION

The plaintiff herein, in effect, seeks a directed verdict that it is free from contributory negligence as a matter of law. A directed verdict will be given only in the most exceptional case. Only where all reasonable men could not differ upon the facts or inferences and the result to be drawn therefrom can the case be taken from the jury. In the instant case, on the other hand, it appears "very foolish" for the plaintiff to have taken part in the design and to have laid out or installed the engine with the air intake located within one and one-half feet of an easily removable regulator on a natural gas line which it is conceded is a dangerous instrumentality. Not only was it designed in this way, the plaintiff laid out and installed or set up the situation; and at the time of the explosion, plaintiff had been at the scene for over four months.

Defendant respectfully submits that the opinion and ruling of United States Court of Appeals for the Sixth Circuit is entirely proper. We further submit there is no reasonable basis for granting certiorari in this case.

RELIEF

Wherefore defendant respectfully requests this Honorable Court to deny the plaintiff's Petition for Writ of Certiorari. All of which is respectfully submitted.

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and

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